FILED
11-20-07
09:14 AM

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006	R. 06-10-005

RESPONSE OF THE CALIFORNIA CABLE AND TELECOMMUNICATIONS ASSOCIATION TO THE PETITIONS OF AT&T AND THE UTILITY REFORM NETWORK FOR REHEARING OF D. 07-10-013.

Pursuant to Rule 16.1(d) of the Commission's Rules of Practice and Procedure, the California Cable and Telecommunications Association (CCTA) hereby files its Response to the Petitions for Rehearing of D. 07-10-013 submitted by AT&T, Verizon, and The Utility Reform Network (TURN) in the above-captioned proceeding , As discussed below, AT&T and Verizon correctly argue that the determination reached in D. 07-10-013 to adopt a requirement that each franchise holder report the number of subscribers by census tract is unlawful, and the Commission must grant their applications for rehearing. On the other hand, TURN's Petition alleging that the Decision's denial for interested parties to file a protest to an application for a state franchise amounts to legal error cannot be supported. TURN's Petition arguing that the Decision commits legal error in determining that the Commission lacks statutory authority to grant intervenor compensation similarly fails, and thus TURN's Petition must be rejected on both counts.

I. *DIVCA Prohibits Any Required Reporting of Video Subscribership by Census Tract*

AT&T, and in particular, Verizon, cogently and correctly argue that the determination to require state franchise holders to report the number of video subscribers by census tract is not authorized, and is prohibited, by DIVCA. As Verizon succinctly states, DIVCA is clear that the Commission may not

impose any requirement on any holder of a state franchise except as expressly provided in DIVCA (Section 5840), (Verizon at 3). Verizon also correctly recalls that census tract reporting of video subscribers was eliminated prior to enactment and cannot be re-imposed by the Commission (Id. at 4).

More importantly, the imposition of a reporting requirement tracking video subscribers on a census tract basis fails to further any regulatory authority over state franchise holders granted to the Commission by the Legislature. Build-out and nondiscrimination requirements have no relation to subscribership. Incumbent cable operators who obtain state franchises have already satisfied the build-out and nondiscrimination requirements imposed by DIVCA, and yet are still required by the Decision to file the information on subscribership.

While the Decision alleges that the number of subscribers could assist the Commission in assessing compliance with nondiscrimination, this is clearly not the case. Nondiscrimination requirements in DIVCA, or even in federal law, are designed to ensure that all segments of society have access to services; they do not compel subscribership, or even promote subscribership.

If subscribership indicates anything at all, it may indicate a personal, cultural and/or financial disinterest in the product, and this is not an aspect of cable service over which the Commission has authority – cable operators are not public utilities, and their content and rates are unregulated by this Commission. Subscribership may also indicate that a customer has simply chosen a different provider, or that the subscriber accesses video service through satellite services (which, like cable operators operating under a local franchise, do not report this information to the Commission). There is nothing to conclude from the statistic of subscribership other than to assume that if the service is available, for some reason unrelated to the Commission's authority, the consumer determined either to engage a different video provider or, perhaps forego cable video service altogether.

Whatever the reason for a customer's decision whether to subscribe to a particular video service, it is simply contrary to common sense and the business interest of any cable operator, incumbent or new

entrant, to deny a person the right to subscribe to its video service, as long as the potential subscriber has access to the service, and it is access that the Commission, and the State, must encourage and prevent from being discriminatory. Accordingly, CCTA supports the Petitions for Rehearing submitted by Verizon and AT&T, and urges the Commission to repeal its requirement to report video subscribers by census tract.

II. The Commission's Decision to Prohibit Protests to Franchise Applications Is Supported By Law.

TURN repeats its arguments made throughout these DIVCA proceedings that the Commission's Decision to prohibit protests to franchise applications is inconsistent with DIVCA and "long accepted Commission [practice] and is thus an error of law (TURN at 11). TURN is, once again, incorrect that the failure to allow protests to franchise applications amounts to legal error, and its Petition to Reconsider protests to state franchise applications must be rejected.

TURN concedes that DIVCA does not specifically authorize protests (TURN at 12), but argues that because one of the principles of the underlying DIVCA legislation is to "maintain all existing authority of the California Public Utilities Commission as established in state and federal statutes," that existing Commission processes are available to the Commission *vis a vis* cable franchise applications.

TURN fails to recognize, however, that existing Commission processes relate specifically to its jurisdiction over public utilities, and that the Legislature specifically created a new, nearly ministerial process for the purpose of expediting state video franchise applications. Indeed, one of the main purposes of DIVCA was to establish a *procedure* for the issuance of state franchises (AB 2987, Legislative Digest), and thus one of the first provisions of the Legislation states that "the *application process* described in this section and the authority granted to the commission under this section shall not exceed the provisions set forth in this section (*See*, AB 2987 Section 5840(b), emphasis added).

TURN asserts that the Commission must allow protests in order to ensure that franchise applications "receive the level of review consistent with both the significant rights and responsibilities to be granted franchisees by DIVCA" (TURN at 14). While this is the level of review that perhaps TURN had hoped AB 2987 would provide, TURN clearly lost its case at the Legislature, and cannot attempt to reinvigorate its rejected argument here. Clearly, AB 2987 provides that the application process is one of statements, descriptions, and specific information, which, if fully provided, compels the Commission to grant the franchise authority. The Commission has no authority to deny a completed application for a state franchise, or even delay a completed application, on the basis of a protest. The Commission thus correctly concludes that there is no basis for protests, and accordingly, TURN's Petition for Reconsideration must be rejected.

III. The Commission Correctly Found That Intervenor Compensation Cannot Be Legally Permitted Because the Holder Of A State Franchise Is Not A Public Utility.

TURN also mistakenly argues that the Commission commits "legal error in determining that the Commission lacks statutory authority to grant intervenor compensation in the video services context." (TURN at 17). TURN suggests that Section 1801, which provides for compensation to public utility customers of participation in any proceeding of the Commission, along with the provision of Section 1803, which mandates awards to those intervenors that comply with certain requirements, allows the Commission to grant intervenor compensation in DIVCA proceedings as well.

TURN's arguments ignore Section 1801.3 (a), which limits intervenor compensation to "all formal proceedings of the Commission involving electric, gas, water and telephone utilities. TURN similarly ignores Section 1801.3 (b) which provides that the provisions of the article shall be administered in a manner that encourages the effective and efficient participation of all groups that have a stake in the pubic utility regulation process. TURN also ignores Section 1807, which provides that awards made

under these statutes are to be paid by the public utility which is the subject of the hearing, investigation or proceeding.

The Commission cannot permit intervenor compensation for participation in Commission proceedings arising from its authority under AB 2987 because the holders of a state-issued franchise are not public utilities, and the Commission is not engaged in a proceeding involving the regulation of a public utility. The Commission does not regulate the rates, terms and conditions of video service, and in contrast to traditional utility regulation, the franchising process at the Commission is largely ministerial, in order to support reliance on markets rather than regulation to meet consumer needs and the public interest. The Commission's determination, that it cannot award intervenor compensation, is fully supported by the law, and cannot be reversed.

IV. Summary

For the reasons set forth herein, the Commission must grant the Petitions for Rehearing submitted by Verizon and AT&T and reject the Petition of TURN to repeal the determinations to prohibit protests to state video franchise applications and disallow intervenor compensation.

DATED: November 20, 2007

Respectfully submitted,

/s/ Lesla Lehtonen
Vice President Legal & Regulatory Affairs
California Cable & Telecommunications Assn.
360 22nd Street #750
Oakland CA 94612
510.628.8043
lesla@calcable.org

CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of November, 2007 caused to be served through the California Public Utilities Commission's Electronic Filing System *RESPONSE OF THE CALIFORNIA CABLE AND TELECOMMUNICATIONS ASSOCIATION TO THE PETITIONS OF AT&T AND THE UTILITY REFORM NETWORK FOR REHEARING OF D. 07-10-013 in R.06-10-005.* The document was served by sending a copy thereof to each such party by e-mail, first-class mail and/or hand delivery.

Executed in Oakland, California.

/s/ Maria Politzer

Maria Politzer